



State coercion to receive medical injections confirms conflicting interpretations of the right to life, liberty and security of the person (Section 7 of the *Canadian Charter of Rights and Freedoms*)

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Abstract

According to the present interpretation of Section 7 of the *Canadian Charter of Rights and Freedoms* developed and applied by Canadian courts, in order to establish a violation a claimant must demonstrate both that the claimant's right to life, liberty, or security of the person is infringed, and that the infringement is not implemented in accordance with the "principles of fundamental justice". Thus, in this interpretation, *Charter* protection for a proven violation of the right to life, liberty, or security of the person can be denied outright by the courts if the claimant does not fulfill an imposed additional obligation to prove that the violation is contrary to principles of fundamental justice. In other words, the government is free to violate the right to life, liberty, or security of the person if it does so in a rigorous and just manner, and the claimant has no further constitutional recourse. This interpretation, which evolved in the context of criminal law, is not consistent with the text of the provision, is antithetical to the purpose of the *Charter*, and can cause grave injustice in cases where government action or law obviously violates life, liberty, or security of the person. This is demonstrated in the recent Quebec Superior Court decision in *Syndicat des métallos, section locale 2008 c. Procureur général du Canada*, which concerned vaccination mandates imposed on non-consenting employees. We argue that in a correct interpretation of s. 7 the "principles of fundamental justice" clause provides an additional protection to claimants, not a barrier.

Contents

1. Introduction	2
2. Origin of the dominant (penal) interpretation	4
2.1 The dominant (penal) interpretation is rooted in a preoccupation with ensuring procedural justice in criminal law	4
2.2 Other interpretations are possible and have been considered	5
3. Medical coercion illustrates that the penal interpretation is fundamentally wrong	9
4. Justice Wilson’s interpretation of s. 7 respects the text and spirit of the <i>Charter</i>	10
5. Conclusion	13

1. Introduction

Section 7 of the *Canadian Charter of Rights and Freedoms* states:

7 Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice

7 Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu’en conformité avec les principes de justice fondamentale.

Read literally, the text of the English version of s. 7 states two rights:

- 1) the right to life, liberty and security of the person, and
- 2) the right not to be deprived of life, liberty and security of the person except in accordance with the principles of fundamental justice.

On the other hand, the French version of s. 7 states one right (the right to life, liberty and security of the person) and states a condition that must be met if this right is to be deprived: “this right cannot be deprived except in accordance with the principles of fundamental justice”.

Logically, based purely on the text of s. 7 (both English and French versions) the “principles of fundamental justice” clause states a necessary but not sufficient condition for depriving an individual’s life, liberty, or security of the person. In other words, life, liberty or security of the person can be deprived *only if* the deprivation is done in accordance with the principles of fundamental justice.

In our view, s. 7 cannot possibly mean that the state is free to violate a person’s right to life, liberty and security as long as it follows the condition of implementing this violation “in accordance with the principles of fundamental justice”. Unfortunately, the courts have tended to follow such a prescription, in decisions that are often far from elegant and clear.

Courts have interpreted s. 7 to mean that the government *certainly may* violate an individual’s right to life, liberty, and security claimant, of the person *as long as* the violation is conducted in accordance with certain legal principles (the “principles of fundamental justice”). In this framework, there is a presumption, which must be overcome by the claimant, that the violation is justifiable.

This interpretation, which we call the “penal interpretation”, is presently the dominant interpretation and it has become deeply ingrained in the Canadian legal mind.^{1,2} It takes the form of a two-part conjunctive onus on the individual bringing forward a s. 7 claim, as stated, for example, by the Court of Appeal for Ontario:

“[31] A person claiming that a law is inconsistent with s. 7 must show that: (1) the law limits the person’s right to life, liberty or security of the person; and (2) the limits are not in accordance with the principles of fundamental justice.”³

Therefore, as stated, the penal interpretation would mean that a law that infringes or denies the right to life, liberty and security of the person cannot be constitutionally challenged if it is written in such a way as to be “in accordance with the principles of fundamental justice”.

Furthermore, according to the penal interpretation, s. 7 is unique among *Charter* provisions in that the individual claimant has an onus to demonstrate that an established violation of a right contained in the provision is unjust.

In the following, we briefly overview the development of the penal interpretation and argue that it is untenable because it allows the government to escape its burden to demonstrably justify infringements of vital individual rights. The dissonance between the penal interpretation and the purpose of the *Charter* – to guarantee individual rights and to force the government to demonstrably justify any limits to those rights – is strikingly illustrated in the recent vaccination mandate case *Syndicat des métallos, section locale 2008 c. Procureur général du Canada*, as we describe below.

¹ See H. Stewart, “Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms” (2nd edition), Irwin Law (Toronto, 2019) for a comprehensive review. Professor Stewart writes: “It is clear from the subsequent cases, if not from the *Motor Vehicle Reference* itself, that section 7 is infringed only where state conduct deprives a natural person of life, liberty, and security of the person *and* where the deprivation is not in accordance with the principles of fundamental justice. Thus, section 7 is not infringed where the principles of fundamental justice are not respected but life, liberty, and security of the person is not affected, or where life, liberty, and security of the person is affected but the principles of fundamental justice are respected.”

² Court decisions expressing the two-part conjunctive onus on the claimant include, for example: *Canadian Society for the Advancement of Science in Public Policy v British Columbia*, 2022 BCSC 1606 (CanLII), <https://canlii.ca/t/jrvqk>, at para. 137; *Gateway Bible Baptist Church et al. v. Manitoba et al.*, 2021 MBQB 219 (CanLII), <https://canlii.ca/t/jk2rp>, at para. 232; *Carter v. Canada (Attorney General)*, 2015 SCC 5 (CanLII), [2015] 1 SCR 331, <https://canlii.ca/t/gg5z4>, at para. 55; *Canada (Attorney General) v. Bedford*, 2013 SCC 72 (CanLII), [2013] 3 SCR 1101, <https://canlii.ca/t/g2f56>, at paras. 91 and 127; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3 (CanLII), [2010] 1 SCR 44, <https://canlii.ca/t/27qn6>, at para. 22. *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 (CanLII), [2000] 2 SCR 307, <https://canlii.ca/t/525t>, at para. 47; *Rodriguez v. British Columbia (Attorney General)*, 1993 CanLII 75 (SCC), [1993] 3 SCR 519, <https://canlii.ca/t/1frz0>, McLachlin J (dissenting), at pg. 622; *R. v. Beare*; *R. v. Higgins*, 1988 CanLII 126 (SCC), [1988] 2 SCR 387, <https://canlii.ca/t/1jbbw>, at para. 28.

³ *Thompson v. Ontario (Attorney General)*, 2016 ONCA 676 (CanLII), <https://canlii.ca/t/gtq9r>.

2. Origin of the dominant (penal) interpretation

2.1 *The dominant (penal) interpretation is rooted in a preoccupation with ensuring procedural justice in criminal law*

Section 7 appears in the *Charter* under the heading “Legal Rights” with sections 8 to 14, which mainly relate to procedural rights of individuals when interacting with the justice system. Most s. 7 cases are brought in the context of criminal law, either to challenge the constitutionality of a sanction applied to a person charged or convicted with a crime, or the constitutionality of a criminal or quasi-criminal legislative provision.

In such cases, there is a strong underlying presumption that it is reasonable for the state to infringe or deprive an individual’s life, liberty, or security the person, since it is presumed to be reasonable for the state to apply penal measures, such as imprisonment, as part of its criminal justice system, and such penal measures obviously infringe on individual liberty.

Examples from early s. 7 cases heard by the Supreme Court of Canada (SCC) include:

- Deportation of people claiming refugee status:⁴ presumed justifiable to deport, but the process lacked procedural justice, for reasons including a lack of oral hearings and inability of the refugee claimant to respond to the immigration minister’s case against him or her.
- Fingerprinting of charged but not-yet-convicted person:⁵ presumed justifiable to take fingerprints pre-conviction, but the law lacked procedural justice because it had no safeguards against abuse of the information by state authorities, and rather than requiring the fingerprinting, the law allowed it at discretion without any guidelines about how the discretion was to be exercised.
- Preventive detention:⁶ presumed justifiable to deprive liberty by imprisoning a convicted criminal, but appellant argued that it was contrary to the principles of fundamental justice to impose preventive detention, in which the period of detention is increased or made indefinite based on finding the convicted person to be a “dangerous offender” based on a psychiatric assessment.
- Double jeopardy:⁷ presumed justifiable to deprive liberty by imprisoning a convicted criminal, but does a second conviction for the same act violate the principles of fundamental justice?
- Extradition:⁸ presumed justifiable to deprive liberty by extraditing a person, but does a multi-year delay on the part of the government in pursuing the extradition process constitute a violation of the principles of fundamental justice?

Due to the ingrained presumption in the Canadian legal system that deprivations of life, liberty, and security of the person are generally reasonable in criminal law, the only criminal-context s. 7 claims that stand any chance of establishing a breach of s. 7 are those in which the claimant has a strong argument

⁴ *Singh v. Minister of Employment and Immigration*, 1985 CanLII 65 (SCC), [1985] 1 SCR 177, <https://canlii.ca/t/1fv22>.

⁵ *R. v. Beare; R. v. Higgins*, 1988 CanLII 126 (SCC), [1988] 2 SCR 387, <https://canlii.ca/t/1jbbw>.

⁶ *R. v. Lyons*, 1987 CanLII 25 (SCC), [1987] 2 SCR 309, <https://canlii.ca/t/1ftlw>.

⁷ *Krug v. The Queen*, 1985 CanLII 2 (SCC), [1985] 2 SCR 255, <https://canlii.ca/t/1ftxk>.

⁸ *United States v. Allard*, 1987 CanLII 50 (SCC), [1987] 1 SCR 564, <https://canlii.ca/t/1ftp3>.

that some aspect of the deprivation is procedurally unjust and for that reason is “not in accordance with the principles of fundamental justice”.⁹

It is easy to see, then, how in these cases the court would expect the claimant to show an element of injustice beyond the presumed-justifiable deprivation of liberty involved in the application of penal-type sanctions such as imprisonment or physical removal of a person from the country.

Hence, the penal interpretation essentially considers the “right” in s. 7 to be a “right not to be deprived of life, liberty, or security of the person in a manner not in accordance with the principles of fundamental justice”, despite the wording of s. 7 that explicitly specifies the “right to life, liberty, and security of the person”.

Through the lens of procedural justice and the presumed-reasonableness of penal sanctions in our criminal justice system, the penal interpretation skews the words of s. 7 to create an onus on the claimant to demonstrate that a limit on a right (the right to life, liberty, or security of the person) is fundamentally unjust.

2.2 Other interpretations are possible and have been considered

The SCC adopted and developed the penal interpretation, with its two-part onus on the claimant, despite rejecting early arguments that s. 7 only provides protection with respect to procedural justice.¹⁰ The Court maintained the penal interpretation, while taking the path of allowing s. 7 claimants to challenge the constitutionality of government action on substantive grounds¹¹ (e.g. that the goal of a law contradicts the basic values of society) including in non-criminal cases.¹²

The notion that the “principles of fundamental justice” clause in s. 7 imposes an onus on the claimant was not set in stone in the early SCC cases. What is sometimes called a “dual right” interpretation¹³ has been put forward, in which an infringement on the right to life, liberty, and security of the person would violate s. 7 without any consideration of the principles of fundamental justice.

This is reflected in Wilson J’s comments in *Operation Dismantle v. The Queen*,¹⁴ which was released on 9 May 1985:

96. Whether or not the facts that are alleged in the appellants' statement of claim could constitute a violation of s. 7 is, of course, the question that lies at the heart of this case. If they could not, then the appellants' statement of claim discloses no reasonable cause of action and

⁹ There are exceptions, for example when a claimant challenges the constitutionality of a criminal law on substantive, not procedural, grounds, such as in *Bedford* (note 2) (challenging *Criminal Code* provisions restricting prostitution) and *Carter* (note 2) (challenging *Criminal Code* provisions prohibiting medically-assisted dying).

¹⁰ *Re B.C. Motor Vehicle Act*, 1985 CanLII 81 (SCC), [1985] 2 SCR 486, <https://canlii.ca/t/dln>.

¹¹ *Bedford* (note 2), paras. 94-96.

¹² *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35 (CanLII), [2005] 1 SCR 791, <https://canlii.ca/t/1kxrh>, para. 197; *Blencoe* (note 2), paras. 45-46.

¹³ H. Stewart, “Fundamental Justice” (note 1); J. Cameron, “From the *MVR* to *Chaoulli v. Quebec*: The Road Not Taken and the Future of Section 7”, *The Supreme Court Law Review: Osgoode’s Annual Constitutional Cases Conference*, 34 (2006) 105-168, <https://digitalcommons.osgoode.yorku.ca/sclr/vol34/iss1/6>.

¹⁴ *Operation Dismantle v. The Queen*, 1985 CanLII 74 (SCC), [1985] 1 SCR 441, <https://canlii.ca/t/1fv0g>.

the appeal must be dismissed. The appellants submit that on its proper construction s. 7 gives rise to two separate and presumably independent rights, namely the right to life, liberty and security of the person, and the right not to be deprived of such life, liberty and security of the person except in accordance with the principles of fundamental justice. In their submission, therefore, a violation of the principles of fundamental justice would only have to be alleged in relation to a claim based on a violation of the second right. As Marceau J. points out in his reasons, the French text of s. 7 does not seem to admit of this two-rights interpretation since only one right is specifically mentioned. Moreover, as the respondents point out, the appellants' suggestion does not accord with the interpretation that the courts have placed on the similarly structured provision in s. 1(a) of the Canadian Bill of Rights: see e.g., *Miller v. The Queen*, 1976 CanLII 12 (SCC), [1977] 2 S.C.R. 680, per Ritchie J., at pp. 703-04.

97. The appellants' submission, however, touches upon a number of important issues regarding the proper interpretation of s. 7. Even if the section gives rise to a single unequivocal right not to be deprived of life, liberty or security of the person except in accordance with the principles of fundamental justice, there nonetheless remains the question whether fundamental justice is entirely procedural in nature or whether it has a substantive aspect as well. This, in turn, leads to the related question whether there might not be certain deprivations of life, liberty or personal security which could not be justified no matter what procedure was employed to effect them. These are among the most important and difficult questions of interpretation arising under the Charter but I do not think it is necessary to deal with them in this case. It can, in my opinion, be disposed of without reaching these issues. [emphasis added]

Later the same year, on 17 December 1985, the SCC released its influential decision *Re B.C. Motor Vehicle Act*¹⁵ ("*Motor Vehicle Reference*"). Lamer J, writing for the majority, explicitly left open the question of whether s. 7 could be interpreted to be violated given only a breach of one's right to life, liberty, and security of the person, without any breach of the principles of fundamental justice:

23. I would first note that I shared the views of Wilson J. in her statement in *Singh v. Minister of Employment and Immigration*, 1985 CanLII 65 (SCC), [1985] 1 S.C.R. 177, at p. 205, that "it is incumbent upon the Court to give meaning to each of the elements, life, liberty and security of the person, which make up the 'right' contained in s. 7". Each of these, in my view, is a distinct though related concept to be construed as such by the courts. It is clear that s. 7 surely protects the right not to be deprived of one's life, liberty and security of the person when that is done in breach of the principles of fundamental justice. The outcome of this case is dependent upon the meaning to be given to that portion of the section which states "and the right not to be deprived thereof except in accordance with the principles of fundamental justice". On the facts of this case it is not necessary to decide whether the section gives any greater protection, such as deciding whether, absent a breach of the principles of fundamental justice, there still can be, given the way the section is structured, a violation of one's rights to life, liberty and security of the person under s. 7. Furthermore, because of the fact that only deprivation of liberty was considered in these proceedings and that no one took issue with the fact that imprisonment is a deprivation of liberty, my analysis of s. 7 will be limited, as was the course taken by all, below and in this Court, to determining the scope of the words "principles of

¹⁵ *Motor Vehicle Reference* (note 10).

fundamental justice", I will not attempt to give any further content to liberty nor address that of the words life or security of the person. [emphasis added]

Wilson J made the following comments in her concurring opinion in the *Motor Vehicle Reference*:

104. Section 7 affirms the right to life, liberty and security of the person while at the same time indicating that a person may be deprived of such a right if the deprivation is effected "in accordance with the principles of fundamental justice". I do not view the latter part of the section as a qualification on the right to life, liberty and security of the person in the sense that it limits or modifies that right or defines its parameters. Its purpose seems to me to be the very opposite, namely to protect the right against deprivation or impairment unless such deprivation or impairment is effected in accordance with the principles of fundamental justice.

105. Section 7 does not, however, affirm a right to the principles of fundamental justice *per se*. There must first be found an impairment of the right to life, liberty or security of the person. It must then be determined whether that impairment has been effected in accordance with the principles of fundamental justice. If it has, it passes the threshold test in s. 7 itself but the Court must go on to consider whether it can be sustained under s. 1 as a limit prescribed by law on the s. 7 right which is both reasonable and justified in a free and democratic society. If, however, the limit on the s. 7 right has been effected through a violation of the principles of fundamental justice, the enquiry, in my view, ends there and the limit cannot be sustained under s. 1. I say this because I do not believe that a limit on the s. 7 right which has been imposed in violation of the principles of fundamental justice can be either "reasonable" or "demonstrably justified in a free and democratic society". The requirement in s. 7 that the principles of fundamental justice be observed seems to me to restrict the legislature's power to impose limits on the s. 7 right under s. 1. It can only limit the s. 7 right if it does so in accordance with the principles of fundamental justice and, even if it meets that test, it still has to meet the tests in s. 1.

106. Assuming that I am correct in my analysis of s. 7 and its relationship to s. 1, an absolute liability offence cannot violate s. 7 unless it impairs the right to life, liberty or security of the person. It cannot violate s. 7 because it offends the principles of fundamental justice because they are not protected by s. 7 absent an impairment of the s. 7 right. Leaving aside for the moment the mandatory imprisonment sanction, I cannot find an interference with life, liberty or security of the person in s. 94 of the *Motor Vehicle Act*. It is true that the section prevents citizens from driving their vehicles when their licences are suspended. Citizens are also prevented from driving on the wrong side of the road. Indeed, all regulatory offences impose some restriction on liberty broadly construed. But I think it would trivialize the *Charter* to sweep all those offences into s. 7 as violations of the right to life, liberty and security of the person even if they can be sustained under s. 1. It would be my view, therefore, that absolute liability offences of this type do not *per se* offend s. 7 of the *Charter*. [emphasis added]

Justice Wilson was of the opinion that the "principles of fundamental justice" clause in s. 7 serves as an additional protection (beyond s. 1) against limits to the right to life, liberty, and security of the person. In her view, the limit to the right to life, liberty, and security of the person first had to be demonstrated to be in accordance with the principles of fundamental justice (within a s. 7 analysis), then had to be found to be demonstrably justifiable (under s. 1), in order for the limit to be upheld.

As established in the landmark decision *R. v. Oakes*¹⁶ (released two months after the *Motor Vehicle Reference*), it is the party limiting the right that has the onus to demonstrate the limit is reasonable:

63. It is important to observe at the outset that s. 1 has two functions: first, it constitutionally guarantees the rights and freedoms set out in the provisions which follow; and, second, it states explicitly the exclusive justificatory criteria (outside of s. 33 of the *Constitution Act, 1982*) against which limitations on those rights and freedoms must be measured. Accordingly, any s. 1 inquiry must be premised on an understanding that the impugned limit violates constitutional rights and freedoms--rights and freedoms which are part of the supreme law of Canada. As Wilson J. stated in *Singh v. Minister of Employment and Immigration*, *supra*, at p. 218: "... it is important to remember that the courts are conducting this inquiry in light of a commitment to uphold the rights and freedoms set out in the other sections of the *Charter*."

64. A second contextual element of interpretation of s. 1 is provided by the words "free and democratic society". Inclusion of these words as the final standard of justification for limits on rights and freedoms refers the Court to the very purpose for which the *Charter* was originally entrenched in the Constitution: Canadian society is to be free and democratic. The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.

65. The rights and freedoms guaranteed by the *Charter* are not, however, absolute. It may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance. For this reason, s. 1 provides criteria of justification for limits on the rights and freedoms guaranteed by the *Charter*. These criteria impose a stringent standard of justification, especially when understood in terms of the two contextual considerations discussed above, namely, the violation of a constitutionally guaranteed right or freedom and the fundamental principles of a free and democratic society.

66. The onus of proving that a limit on a right or freedom guaranteed by the *Charter* is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation. It is clear from the text of s. 1 that limits on the rights and freedoms enumerated in the *Charter* are exceptions to their general guarantee. The presumption is that the rights and freedoms are guaranteed unless the party invoking s. 1 can bring itself within the exceptional criteria which justify their being limited. This is further substantiated by the use of the word "demonstrably" which clearly indicates that the onus of justification is on the party seeking to limit: *Hunter v. Southam Inc.*, *supra*. [emphasis added]

In the case of s. 7, the "right" that could be subjected to limiting is written, black-on-white, in both the English and French versions of the *Charter* as the "right to life, liberty, and security of the person".

¹⁶ *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 SCR 103, <https://canlii.ca/t/1ftv6>.

However, as we will see below, the penal interpretation allows this right to be limited in egregious ways that never have to be demonstrably justified by government. This is due to the penal interpretation's onus requiring that the claimant demonstrate the infringement of his or her life, liberty, or security of the person is fundamentally unjust. This is why we argue that the penal interpretation must be incorrect.

3. Medical coercion illustrates that the penal interpretation is fundamentally wrong

Canadian courts have long recognized the fundamental importance of the freedom to make personal medical choices, for example, in *R. v. Morgentaler*:¹⁷

I agree with the Chief Justice and with Beetz J. that the right to 'security of the person' under s. 7 of the Charter protects both the physical and psychological integrity of the individual. State enforced medical or surgical treatment comes readily to mind as an obvious invasion of physical integrity. [emphasis added]

and in *Carter v. Canada*:¹⁸

[30] Turning to s. 7 of the Charter, which protects life, liberty and security of the person, the trial judge found that the prohibition impacted all three interests. The prohibition on seeking physician-assisted dying deprived individuals of liberty, which encompasses "the right to non-interference by the state with fundamentally important and personal medical decision-making" (para. 1302). In addition, it also impinged on Ms. Taylor's security of the person by restricting her control over her bodily integrity. While the trial judge rejected a "qualitative" approach to the right to life, concluding that the right to life is only engaged by a threat of death, she concluded that Ms. Taylor's right to life was engaged insofar as the prohibition might force her to take her life earlier than she otherwise would if she had access to a physician-assisted death. [emphasis added]

In 2021, the Canadian federal government imposed vaccination mandates affecting employees in federally-regulated sectors and travelers. A number of cases were brought forward challenging the vaccination mandates on s. 7 grounds.¹⁹

¹⁷ Wilson J in *R. v. Morgentaler*, 1988 CanLII 90 (SCC), <https://canlii.ca/t/1ftjt>, at pg. 173.

¹⁸ *Carter* (note 2), at para. 30.

¹⁹ *Zbarsky v. Canada*, 2022 FC 195 (CanLII), <https://canlii.ca/t/jmgfg>; *Michalski v. McMaster University*, 2022 ONSC 2625 (CanLII), <https://canlii.ca/t/jnzvs>; *Turmel v. Canada*, 2022 FC 732 (CanLII), <https://canlii.ca/t/jpj14>; *Canadian Society for the Advancement of Science in Public Policy v British Columbia*, 2022 BCSC 1606 (CanLII), <https://canlii.ca/t/jrvqk>; *Costa, Love, Badowich and Mandekic v. Seneca College of Applied Arts and Technology*, 2022 ONSC 5111 (CanLII), <https://canlii.ca/t/jrwms>; *Toronto District School Board v CUPE, Local 4400*, 2022 CanLII 22110 (ON LA), <https://canlii.ca/t/jnbd3>; *Lavergne-Poitras v. Canada (Attorney General)*, 2021 FC 1232 (CanLII), <https://canlii.ca/t/jkd88>.

In one such case, *Syndicat des métaux, section locale 2008 c. Procureur général du Canada*²⁰ (“*Syndicat des métaux*”), several unions and individual employees challenged the constitutionality of the Minister of Transport’s order requiring vaccination in the marine, air, and railway transportation sectors.²¹

Syndicat des métaux is a clear case where an application of the penal interpretation of *Charter* s. 7 leads to the absurdity in which *Charter* protection is denied (s. 7 is found not to be infringed) where an evidence-based explicit court finding of infringement of the right to liberty and security of the person is made.²²

Syndicat des métaux also appears to be the first superior court case in Canada in which a regulatory vaccination mandate, under the pressure of possible or actual job loss, is expressly found, on an extensive evidentiary basis, to constitute definite coercion²³ and a violation of the right to liberty and security of the person.²⁴ But this violation was allowed by the court without needing further consideration because the regulatory scheme was not proven by the claimant to be contrary to principles of fundamental justice.²⁵

4. Justice Wilson’s interpretation of s. 7 respects the text and spirit of the *Charter*

The penal interpretation of s. 7 is egregiously wrong, because it permits fundamental freedoms to be violated without the violation needing to be demonstrably justified by government. The penal interpretation is thus non-compliant with the *Charter*, and a different interpretation is needed to protect the right to life, liberty, and security of the person. We propose the interpretation expressed by Justice Wilson in the *Motor Vehicle Reference*.²⁶

The flowchart in Fig. 1 (below) summarizes the steps in the decision-making process followed by the court in applying the penal interpretation in response to a s. 7 *Charter* claim. As can be seen in the figure, the two-part conjunctive onus on the claimant means that the court will only find a government action or law to have breached s. 7 if the claimant establishes that his or her right to life, liberty, or security of the person is infringed and that the infringement is not in accordance with the principles of fundamental justice. If both conditions are satisfied, then s. 7 is found to be breached, and the infringement will only be found to be non-compliant with the *Charter* if the government is unable to demonstrably justify the infringement under s. 1.

²⁰ *Syndicat des métaux, section locale 2008 c. Procureur général du Canada*, 2022 QCCS 2455 (CanLII), <https://canlii.ca/t/jq3kf>.

²¹ *Ibid.*, para. 1.

²² *Ibid.*, paras. 176-179.

²³ *Ibid.*, para 176.

²⁴ *Ibid.*, paras. 176-179.

²⁵ *Ibid.*, paras. 212-214.

²⁶ *Motor Vehicle Reference* (note 10), at paras. 104-106 [quoted in section 2.2 of this article].

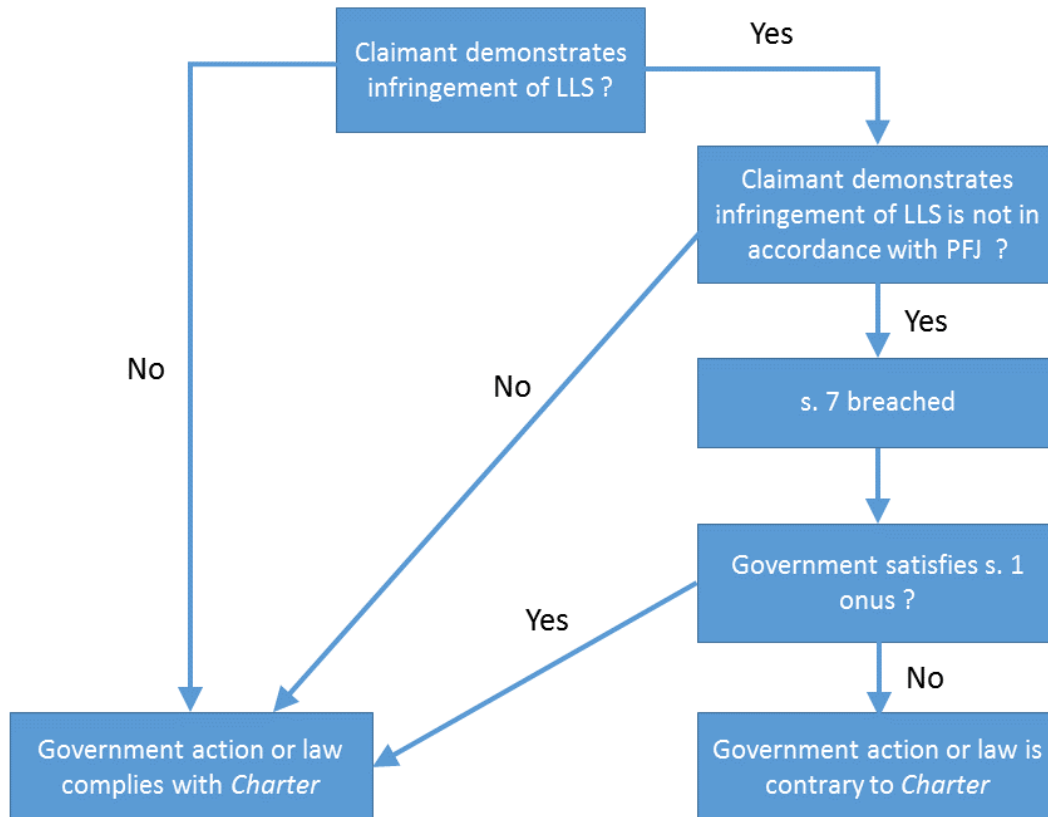


Figure 1: Decision process for a *Charter* claim in the dominant (“penal”) interpretation of s. 7. “LLS” stands for any of life, liberty, or security of the person, and “PFJ” stands for “principles of fundamental justice”.

Figure 2 (below) shows a flowchart of the decision-making process in Justice Wilson’s interpretation of s. 7. As in the penal interpretation, the analysis begins with an onus on the claimant to establish that his or her right to life, liberty, or security of the person has been infringed. If no such infringement is established, then the government action or law complies with the *Charter*. However, if there is such an infringement, then this is enough to establish a breach of s. 7. Once a breach of s. 7 has been established, and if the claimant further claims an application impairment regarding the principles of fundamental justice, then the court must further decide whether the claimant has demonstrated that the infringement is implemented in a way that is not in accordance with the principles of fundamental justice. If the claimant is unable to establish this, or if the claimant did not raise this issue, then the analysis proceeds to the step of s. 1, in the usual manner following the establishment of a breach of a *Charter* right. If, however, the claimant does establish that the infringement is not in accordance with the principles of fundamental justice, then the infringement is non-compliant with the *Charter* and no s. 1 analysis is needed.

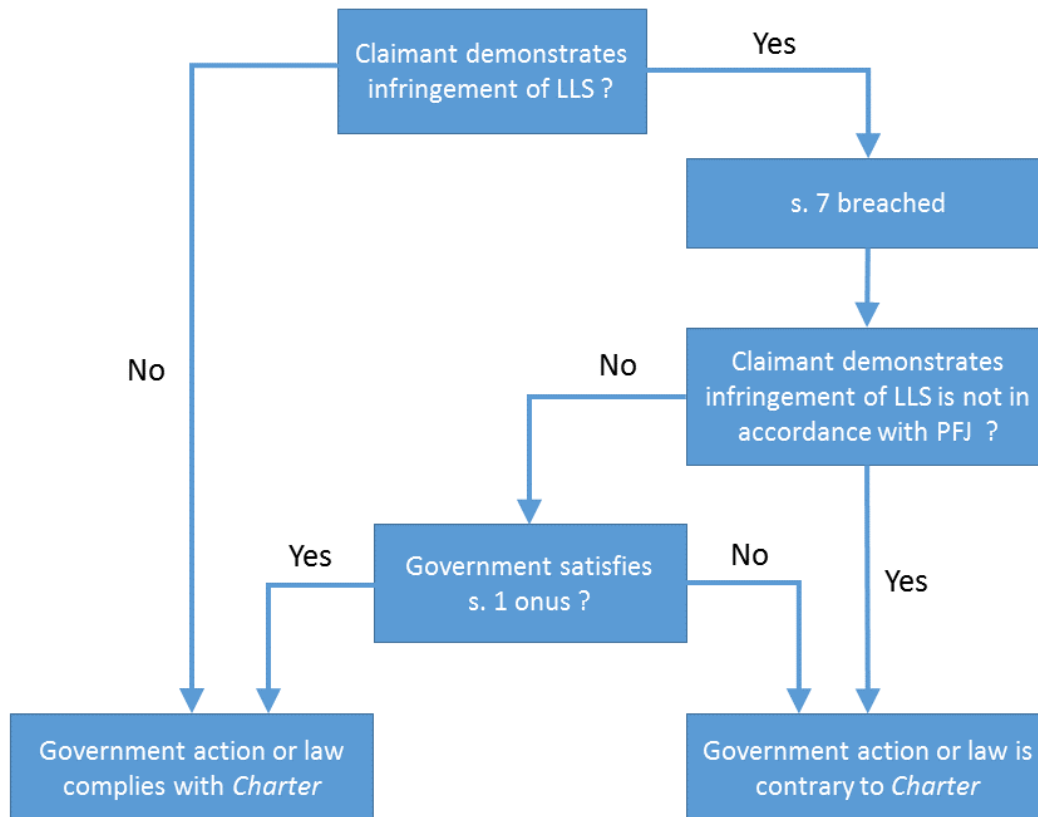


Figure 2: Decision process for a *Charter* claim in the interpretation of s. 7 expressed by Justice Wilson in the *Motor Vehicle Reference*. “LLS” stands for any of life, liberty, or security of the person, and “PFJ” stands for “principles of fundamental justice”.

The flowchart in Fig. 2 thus has two routes that end in *Charter* compliance and two that end in *Charter* non-compliance, whereas Fig. 1 has three routes that end in *Charter* compliance and one that ends in non-compliance. As such, the two analytic schemes (penal vs Wilson) are structurally distinct and systemically different in effect. Both cannot be correct and they are not interchangeable. The Wilson scheme is perfectly suited to both penal and non-penal cases. In penal cases, breach of the right to life, liberty, or security of the person will usually be immediate (and most often trivially justified) and one moves directly to consideration of the principles of fundamental justice.

Justice Wilson was concerned that “it would trivialize the *Charter* to sweep all [regulatory, including non-criminal] offences into s. 7 as violations of the right to life, liberty and security of the person even if they can be sustained under s. 1”.²⁷ In the years since the *Motor Vehicle Reference* (released 17 December 1985), the SCC has considered many various claims of infringement on life, liberty, and security of the person, and its decisions show that the types of “trivial” offences mentioned by Wilson J would not be found to violate life, liberty or security of the person.

For example, driving on the wrong side of the road – the example of a trivial offence used by Justice Wilson – would not be found to infringe on the right to liberty under the current state of the law.

²⁷ *Ibid.*, at para. 106.

Beyond protection against physical restrictions such as imprisonment or the threat of imprisonment, the right to liberty protects a sphere of personal autonomy involving “inherently private choices” that are at “the core of what it means to enjoy individual dignity and independence”.²⁸ Many claims of infringement on liberty will not pass this threshold; for example, the SCC has found that the right to liberty does not protect lifestyle choices such as cannabis consumption,²⁹ or against being subjected to conditions of employment (such as on-call duty) that interfere with employees’ abilities to partake in activities and fulfil family responsibilities outside of regular working hours,³⁰ or the freedom to choose a certain career,³¹ etc.³²

It is actually the least trivial, penal-type measures that would result in an essentially automatic finding of a s. 7 breach in Fig. 2. In such cases, when the measure is deemed to be in accordance with the principles of fundamental justice, a s. 1 analysis would need to be done. We do not believe it would trivialize or reduce the value of the *Charter* to subject any government measure that obviously infringes on a s. 7 right to a s. 1 scrutiny.

5. Conclusion

In the present “penal” interpretation of Section 7 of the *Canadian Charter of Rights and Freedoms* used by the courts and administrative tribunals, an individual subjected to an infringement of the right to life, liberty and security of the person has the onus to show that implementation of the infringement is unjust. Due to this onus, egregious rights violations are permitted by decision makers without the government being required to demonstrably justify that its actions or laws causing the said violations are reasonable.

State coercion to receive medical injections is a prominent contemporary example, as illustrated in the Quebec Superior Court case of *Syndicat des métallos*. In that case, the injections were found on an evidentiary basis to be definitely coercive and to infringe the right to life, liberty, or security of the person, yet s. 7 was determined not to have been violated because the implementation was not contrary to principles of fundamental justice.

The Canadian s. 7 jurisprudence is in need of a reboot that respects the text and spirit of the *Charter*. Justice Wilson’s interpretation of s. 7 expressed in her concurring decision in *Re B.C. Motor Vehicle Act* would accomplish this and should be considered as a replacement for the penal interpretation.

²⁸ *Godbout v. Longueuil (City)*, 1997 CanLII 335 (SCC), [1997] 3 SCR 844, <https://canlii.ca/t/1fqxp>, at para. 66; *Association of Justice Counsel v. Canada (Attorney General)*, 2017 SCC 55 (CanLII), [2017] 2 SCR 456, <https://canlii.ca/t/hmvq2>, at para. 49.

²⁹ *R. v. Malmö-Levine; R. v. Caine*, 2003 SCC 74 (CanLII), [2003] 3 SCR 571, <https://canlii.ca/t/1gbdn>, at paras. 86-87.

³⁰ *Association of Justice Counsel* (note 28).

³¹ *Chaoulli* (note 12), at paras. 201-202.

³² Government of Canada, “Charterpedia: Section 7 – Life, liberty and security of the person”, (Accessed 13 October 2022, Last updated August 2021), <https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccd/1/check/art7.html>.